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IN THE

Supreme Court of the United States

No. 919—October Term, 1965

IRVING W. POWLESS,

Petitioner,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

POINT I

General Rules on tax exemption are inapplicable.

This is not an ordinary case of income that is tax-exempted. The general doctrine against tax exemption is irrelevant in considering the taxing power of a state in relation to Indians. Dissenting Opinion of Mr. Justice Murphy in *Oklahoma Tax Commission* v. *U. S.*, 319 U. S. 598, 612, 613 (1942), quoted with approval in *Big Eagle* v. *U. S.*, 300 F. 2d 765, 771, 772 (U. S. Court of Claims, 1962). In this latter case, the Court said at page 779:

> it is necessary to assess the weight to be given to two principles difficult to reconcile. The first of

> these, as laid down by the decisions, is that tax exemptions must be clearly expressed and cannot be granted by implication. The second principle is that statutes affecting Indians must be liberally construed, with all doubtful expressions being resolved in their favor.

Choate v. *Trapp*, 224 U. S. 665 (1912), *Sakezzie* v. *Utah State Indian Affairs Commissioner*, 215 F. S. 12, 17 (1963), *Ash Sheep Company* v. *U. S.*, 252 U. S. 159 (1920), *Kirkwood* v. *Arenas*, 243 F. 2d 863, 867 (1957) and *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1929).

U. S. v. *Stewart*, 311 U. S. 60 (1940) cited in Brief in Opposition at page 5 though ruled that exemption from taxation cannot rest upon mere implication, yet it cited Mr. Justice Cardozo in *Trotter* v. *Tennessee*, 290 U. S. 354, 356 (1933) in which he stated:

> Exemptions from taxation are not to be enlarged by implications if doubts are nicely balanced. * * * On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers.

POINT II

Cases not involving Reservations are distinguishable.

In his Brief, respondent relied on cases that dealt with territories outside the Reservations where is was said that state laws applied. *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556, 562 (1916) did not involve a Reservation but land ceded to Robert Morris by the Seneca Nation by the Treaty of "Big Tree" of September 15, 1797, 7 Stat. 601. This land admittedly was within the jurisdiction of the State of New York. This Court said at page 564:

> It should be added that we have not considered any question relating to conduct or fishing rights

upon territory, not ceded, which is comprised within the Indian Reservation.

U. S. v. *Holliday,* 70 U. S. (3 Wall.) 407, 411 (1865) dealt with a sale of liquor not on an Indian Reservation or on Indian country but in an organized county of the State of Michigan. This Court held that the subject of the regulation of use and sale of liquors, within the State and away from Indian Reservations, is a matter for the State, in the exercise of its police powers.

U. S. v. *McGowan,* 302 U. S. 535 (1937) was concerned with Reno Indian Colony, an area that was undisputable Nevada and which was recognized as such by the Federal Government.

Kake Village v. *Egan,* 369 U. S. 60, 62 (1961) did not involve a reservation. This case is to be read with the companion case of *Metlakatla Indian Community* v. *Egan,* 369 U. S. 45 (1961). Furthermore, it is to be noted that Mr. Justice Frankfurter, in these two cases, has clearly indicated that Indians of Southeastern Alaska, are distinguishable from Indian Tribes in the United States by reason that they were not aboriginal natives of Alaska but migrated from Canada, they never had a treaty with the United States and were never in the hostile and isolated position of many tribes in other States.

In contrast, this Court in *Foster* v. *Pryor,* 189 U. S. 325, 329-331 (1903) held that a Reservation was not part of the State of Oklahoma.

POINT III

Revenue Statutes not based on residence distinguished.

There is a distinction between Tax Statutes that impose the tax on "every individual" and on income "from any source whatever" as in *Superintendent of Five Civilized Tribes* v. *Commissioner of Internal Revenue,* 295 U. S. 418 (1938), and exclusive reliance on residence as the basis for imposing the tax as in the case at bar. (Respondent's Brief, Page A4)

Leahy v. *State Treasurer of Oklahoma,* 297 U. S. 420 (1936) cited by respondent at page 3 as the reason for denying the Petition is distinguished from the present case in that it was decided on the authority of *Choteau* v. *Burnet,* 28 3 U. S. 691 (1931), and the facts were substantially the same as those presented by Choteau. Moreover, the case involved, as in the Choteau case, *a competent* member of Osage Tribe who has received certificate of competency. In the Supreme Court of Oklahoma, 49 P. 2d 570 (1935), the State of Oklahoma rested its case on the issuance of the certificate of competency and the removal of tribal relations and other restrictions.

In the Leahy case, supra, the Oklahoma Statute involved, Income Tax Act of 1931, *Oklahoma Statutes Annotated,* Title 68 (Appendix, p. 477), Article 4, levied a tax "upon the entire income of every person residing or domiciled within the State derived from all property owned and from every business, trade, profession or occupation * * * and upon the net income of every person residing or domiciled elsewhere derived from property owned and business done within the state." The question

of residence was not invoked for it was immaterial. In the case at bar, Respondent is arguing that peitioner is a resident of the State of New York, and the imposition of the tax is rested on this residence alone.

The Indian involved in *Canary* v. *Oklahoma Tax Commission,* 295 P. 2d 281 (1956) was not a restricted Indian.

POINT IV

Congress alone has the power to determine the termination of national guardianship over Indians.

This rule has been consistently advocated by this Court. *U. S.* v. *Waller,* 243 U. S. 452, 459 (1916) and cases cited there clearly established that only Congress has the power to determine when and how the national guardianship over Indians shall be terminated. In the case last cited, this Court also held that it rests with Congress to determine the time and extent of emancipation of Indians.

In *U. S.* v. *Holliday,* 3 Wall. 407, 419, this Court held:

> No State can, either by its Constitution or other legislation, withdraw the Indians within its limits from the operation of the law of Congress regulating trade with them, notwithstanding any rights it may confer on them as electors or citizens.

It is, therefore, totally inconsistent with the decisions of this Court the contention of respondent at page 7 of his Brief in Opposition that "the New York Indians have been legally assimilated into the polity which is the 'People of the State of New York'". This situation was explained in *State* v. *Columbia George,* 39 Oregon 127, 65 P. 604, 610 (1901) as follows:

> • • • citizenship • • •, is neither inconsistent nor incompatible with the status of a tribal Indian;

> that the government, while it has bestowed citizenship, has not thereby relinquished the guardianship of the tribes. * * * The condition may appear to be an anomalous one that a person may be admitted to citizenship under one government and yet be permitted to maintain allegiance to another, however primitive that other may be. But such seems to be the natural outgrowth of the anomalous attitude that the general government has maintained towards the Indian from the beginning.

Conclusion

This Court though has not decided the specific question presented in this case, has upheld petitioner's contentions. Cases cited by respondent are clearly distinguished from the case at bar.

We respectfully request this Court to grant the Petition for Writ of Certiorari.

Dated: New York, New York,
February 10, 1966.

Respectfully submitted,

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